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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1071 84

DIXIE PINE PRODUCTS COMPANY, A CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. J. WILLIS,
Counsel for Petitioner.

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The Dixie Pine Products Company, a corporation, through its attorney, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, directing it to send up the record in the above-entitled cause, to be reviewed by this court and such order entered therein as may appear from the record is meet and proper to be entered in said cause.

I.

Summary of the Matters Involved and a Brief Statement of the Facts.

A. HISTORY OF THE CASE.

This case involved the assessment of an additional tax by the Commissioner of Revenue against petitioner for the year 1937.

Petitioner is engaged in the naval stores business, reducing the pine stumps and dead wood left behind the saw mill operations in the yellow pine belt. There were in 1937 five such plants operating in different sections of the State of Mississippi. In an operation of this character a solvent is used to dissolve the rosin from pine chips that have had the turpentine and pine oil removed by steam. Petitioner used between 300,000 and 400,000 gallons annually.

The State of Mississippi in 1932 imposed a gasoline tax of 6¢ per gallon on all gasoline petroleum products meeting a certain test that was used, consumed or sold in the State of Mississippi. This reducing agent, or solvent, used by petitioner was a cut of gasoline having an initial boiling point of 230 degrees fahrenheit and a vanishing point of 290 degrees fahrenheit, whereas gasoline itself had an initial point of 80 degrees fahrenheit and a vanishing point of 432 degrees fahrenheit.

The naval stores plants using this solvent did not pay the gasoline tax imposed by Legislative enactment for the four years from 1932 to 1936 on the theory that the tax did not apply.

In 1936 the Legislature appointed a Roving Committee to make investigations of businesses in the State that had escapted paying gasoline tax. This Roving Committee demanded the tax of the five naval stores plants and finally adjusted it by the different industries paying ¼ of 1% per gallon in lieu of the 6¢ that was levied in the Legislative enactment.

The Legislature in 1936 amended the gasoline revenue law, created a Commissioner of Motor Vehicles, with powers and authority from and after its effective date to levy and collect all gasoline taxes. The effective date of the act was May 1st, 1936.

The Roving Committee, in its many searches and meanderings about the state, did not finally make demand for this tax until July 1936 and an adjustment was made about August 1st. The 1936 Act, however, had become effective and the Commissioner had no power and authority to waive any part of the tax but was required to collect the tax plus a 25% penalty for delinquency.

The five naval stores companies, including petitioner herein, began paying the tax beginning September 1, 1936, leaving the tax that had accrued, with the penalty thereon, from May 1st to September 1st, open for future negotiations and final adjustment.

This petitioner thereupon filed a bill in Chancery in Hinds County, asking for an injunction enjoining the Commissioner from collecting the tax on the ground that the law did not apply to the solvent. The suit was one that might be called a friendly or collusive suit. What is meant by it being a collusive suit is that the petitioner and the Motor Vehicle Commissioner, through their attorneys, got together and drew a bill that set forth all of the facts as they were, which was filed by petitioner, to which the Motor Vehicle Commissioner interposed a demurrer, a final decision of which would determine the liability of the industries to pay the tax.

The bill of complaint was filed. A demurrer was interposed and the Chancellor sustained the demurrer and dismissed the bill. An appeal was prosecuted to the State Supreme Court and was there reversed.

The decision of the Supreme Court was handed down in January of 1937. The Supreme Court held that under the statement of facts set forth in the bill of complaint that the gasoline tax did not apply to the solvent. Of course, the decision being from a decree sustaining a demurrer, the case was remanded for further proceedings in accordance with

the opinion there rendered. Appellant immediately ceased to pay the tax for the reason that the facts set forth in the bill of complaint represented the agreed facts between the Motor Vehicle Commissioner and the tax payer, petitioner here. In May of 1937, however, the Assistant Attorney General for the Motor Vehicle Commissioner, filed an answer in the cause denying every fact set forth in the bill of complaint, upon the allegation of which the Supreme Court of the State had based its decision. The other four industries continued to pay the tax. Petitioner herein, under advice of counsel, declined to pay the tax but being on an accrual basis, accrued it. There was no provision for a refund of the tax, if erroneously paid in, and for that reason the petitioner here was advised not to pay the tax in but to accrue it and hold it until the necessity of paying it should be determined by a final decision of the highest court.

In December 1938 the personnel of the Assistant Attorney General's office having changed, a stipulation was made and filed in the case pending, stipulating the facts, the same as they were in the bill of complaint. This stipulation of facts then made the former opinion of the Supreme Court the law of the case and there was no possible chance for a different holding or a contrary decree being entered.

The Chancellor, in December of 1938, entered a final decree enjoining the collection of the tax holding that it did not apply to the solvent. Petitioner herein, thereupon took into its accounts, as a re-captured profit, the sum of $20,840.12, which had been accrued and held against the tax liability.

The tax payer, petitioner here, had taken credit for the accrued tax in its 1937 return. It recaptured the accrued tax in 1938 and placed it in its tax return and settled its tax with the Commissioner of Internal Revenue accordingly.

B. Statement of the Case.

The Commissioner of Internal Revenue denied the tax payer the right to accrue the tax and take credit for it in 1937, for the reason that it was a contested levy of tax and one that might never become final. The Commissioner assessed a deficiency income tax of $3600.09 and an excess profit tax of $1169.95.

A hearing was had before the Commissioner and the levy of the tax sustained. An appeal was taken to the Board of Tax Appeals. The Board of Tax Appeals affirmed the assessment, however, by a divided court. The opinion is on record page 61.

From the decision of the Board of Tax Appeals an appeal was prosecuted to the Circuit Court of Appeals for the Fifth Circuit and was there affirmed. It is to reverse the decision there rendered that this writ of certiorari from this court is sought. The Circuit Court of Appeals, in affirming the case, said that a mere contingent claim, especially a contested one, may never be sustained or realized; it is too uncertain to be considered in making up an income tax return. The court based its opinion upon the authority of cases cited therein, which is on page 4 of the addenda of the record in this case. The cases cited by the court, as authority for its decision, are cases in which the tax payer sought a reduction in its tax upon a contingent liability arising out of breaches of contract and contractual relations and not a liability imposed by statute. In this case the liability was imposed by law. Four of the tax payers conceded liability and paid the tax. It is true they received a refund of the tax by Legislative appropriation after the final decision in the state court, but upon the facts set forth in the answer thereto there was a positive liability for the tax. The cases relied upon by the Circuit Court of Appeals are not applicable. The opinion rendered in this case is in

conflict with the opinion of the Circuit Court of Appeals of the Sixth Circuit in *Commissioner of Internal Revenue* v. *Central United National Bank*, 99 F. (2d) page 568 and the opinion of the Second Circuit Court of Appeals in J. A. Daugherty Sons, Incorporated, 121 F. (2d) page 700.

Prayer for Writ.

Wherefore petitioner respectfully submits that this petition should be sustained and prays that a writ of certiorari may issue, as is provided by law.

Respectfully submitted,

Dixie Pine Products Company,
a Corporation,
Petitioner,
By T. J. Wills,
Attorney for Petitioner,
Hattiesburg, Mississippi.

T. J. Wills,
Atty. for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

The Circuit Court of Appeals is in error in affirming the decision of the Board of Tax Appeals levying the tax and excess profit tax in this case.

The law is well settled that the tax payer had to accrue the tax and take credit for it on its income for the year that the liability arose or it would be shut off from getting credit in a subsequent year.

Great Northern R. R. Co., 30 B. T. A. 691.

The tax liability was imposed by statute and whether or not the petitioner, as a tax payer, would have the tax to pay depended upon the physical character of the solvent, as shown by pleadings and proof in the trial of the case. What those physical properties would be, as is shown by the action in this case, rested largely upon the presentation

made by the tax payer and the Commissioner of Motor Vehicles, charged with the duty of levying and collecting the tax. There was no contingency of law as to whether or not the tax applied. What the contingency raised were the facts as presented in the case and such a contingency was one that is recognized as warranting the accrual of the tax by the tax payer on the accrual basis.

This opinion is in conflict with the cases of Central United National Bank, 99 Federal (2nd) page 568 and J. A. Daugherty Sons, Incorporated, 121 Federal (2nd) page 700.

This court should take jurisdiction and clarify the law since there is a conflict in the decisions of the Circuit Courts of Appeal.

Respectfully submitted,

T. J. Wills,
Attorney for Petitioner.

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